UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CABLEVISION SYSTEMS CORP.
Employer

and Case 29-RD-138839

TIFFANY OLIVER
Petitioner

and

COMMUNICATION WORKERS
OF AMERICA, AFL-CIO
Union

ORDER

The Employer's Request for Review of the Regional Director's Decision to Dismiss the petition is denied as it raises no substantial issues warranting review.[1]

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[1] The Employer's request for oral argument is also denied.

The Board agrees with the dismissal of the petition in light of the nature of the unfair labor practice allegations of surface bargaining, which the Regional Director found to have merit and for which a bargaining order and extension of the certification year are being sought. Such conduct, if proven, would preclude the existence of a question concerning representation and therefore the petition is appropriately dismissed. See Casehandling Manual, Part II Representation Proceedings, Section 11733.2(a)(2). Although those allegations were dismissed by Administrative Law Judge Steven Fish in *CSC Holdings, LLC and Cablevision Systems New York City Corporation*, JD(NY)-47-14 (2014), that dismissal is currently pending on exceptions before the Board. Should the surface bargaining allegation ultimately be found by the Board to be without merit, the Regional Director may consider whether dismissing the petition on other grounds may be appropriate based on the remaining unfair labor practice allegations found to be meritorious, if any, or whether the petition should be reinstated, after final disposition of the unfair labor practice charges.

Contrary to our colleague's criticism of the Board's longstanding blocking charge policy, we find it continues to serve a valuable function, especially in cases such as this one, where the Regional Director judged unfair labor practice allegations sufficiently meritorious to issue a complaint, and sufficiently egregious to warrant seeking a bargaining order. As explained in our recent rulemaking, the blocking charge policy is critical to protecting employees' exercise of free choice. See Representation-Case Procedures, 79 Fed. Reg. 74308, at 74418-74420, 74428-74429 (Dec. 15, 2014). Indeed, "[i]t advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference." Id. at 74429. Nevertheless, in response to commentary and our colleague's concerns, the Rule modified the policy to limit opportunities for unnecessary delay and abuse. Id. at 74419-20, 74490. We note that in upholding the Rule, the U.S. Court of Appeals for the Fifth Circuit recently rejected an argument similar to our colleague's and found that the Board did not act arbitrarily by implementing various regulatory changes resulting in more expeditious processing of representation petitions without eliminating the blocking charge policy altogether. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, __ F.3d __, 2016 WL 3228174 at *8 (5th Cir. June 10, 2016). The delay associated with this case does not cause us to reconsider our earlier judgment that a modified blocking charge policy is worthy of preservation.

MARK G. PEARCE, CHAIRMAN

PHILIP A. MISCIMARRA, MEMBER

KENT Y. HIROZAWA, MEMBER

Dated, Washington, D.C., June 30, 2016.

Member Miscimarra favors a reconsideration of the Board's blocking charge doctrine for reasons expressed in the dissenting views that were contained within the Board's representation election rule, 79 Fed. Reg. 74308, at 74430-74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson), but he acknowledges that the Board has declined to materially change its blocking charge doctrine, and he agrees that the Regional Director did not abuse his discretion in applying the doctrine in the instant case. However, Member Miscimarra believes the instant case illustrates the fact that the Board's blocking charge doctrine results in unfairness to the parties and, in the circumstances presented here, does violence to the Act's basic charge that the Board "in each case" ensure parties have "the fullest freedom in exercising the rights guaranteed by [the] Act." Sec. 9(b). Member Miscimarra notes that the Board's revisions to the election rule were premised, in large part, on the urgency of permitting employees to participate in elections as soon as possible that give effect to their sentiments regarding union representation. See, e.g., 79 Fed. Reg. at 74324 ("The Board believes that its duty is to perform its statutory functions as promptly as practicable"); id. at 74414 (referring to the goals of "eliminating unnecessary litigation and expeditiously resolving questions of representation"); id. at 74422 ("while the Act does not include . . . language [requiring elections to occur "on the earliest date practicable"], its very structure and relevant provisions demonstrate consistent and repeated support for that goal"); id. (the Act's provisions "manifest a consistent and powerful concern with the expeditious resolution of questions concerning representation, as has been recognized in Supreme Court opinions and in the relevant legislative history"); id. at 74424 ("regional directors should continue to hold elections as soon as practicable in the circumstances of each case"). In Member Miscimarra's view, the blocking charge doctrine permits the mere filing of a Board charge to frustrate NLRB procedures that are aimed at permitting employees to express their sentiments about representation, and this problem is especially evident in the instant case, where (i) the petition was filed on October 16, 2014; (ii) the filing of "blocking charges" resulted in the petition's dismissal on November 12, 2014; (iii) the primary alleged basis for blocking the election – alleged surface bargaining by the Employer – was found to *lack merit* by the administrative law judge (ALJ) on December 4, 2014; (iv) almost all allegations in a separate blocking charge were found to *lack merit* – one and one-half years later – by a different ALJ on April 29, 2016; and (v) it remains possible that *none* of the blocking charge allegations will be found to have merit, or at least the meritorious allegations may be deemed insufficient to warrant *any* deferral of the election. Nonetheless, the blocking charge doctrine will have prevented employees – for a period of years – from even *voting* in a Board-conducted election, much less having those votes counted, or giving effect to whatever sentiments they may express regarding ongoing representation. Member Miscimarra believes this prolonged uncertainty – before employees are even permitted to cast votes in a Board election – disfavors *all* parties and renders illusory the primary goal of our statute, which is to permit employees to exercise the right of "*self*-organization" and to make their own determination regarding whether or not they choose to have union representation. Sec. 7 (emphasis added). Thus, Member Miscimarra believes that, given the focus of the Act and the election rule on "conducting elections as soon as possible," it is "irrational and self-defeating to retain the blocking charge doctrine, which prevents many elections from taking place *for years*." Id. at 74456 (dissenting views of Members Miscimarra and Johnson) (emphasis in original).